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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

FEDERAL TRADE COMMISSION, *Petitioner*

v.

THE AMERICAN OIL COMPANY, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

PRELIMINARY STATEMENT

In this case, the Federal Trade Commission seeks review of a Court of Appeals decision despite the Solicitor General's avowal that he "does not agree with the Commission" in its legal interpretations and "on the merits" (Pet. 16), and although Commissioner Elman's *dissenting opinion*, adopted by the court below, has already been cited by this Court on the key

legal issue now in controversy. See *Federal Trade Commission* v. *Sun Oil Co.*, 371 U. S. 505, 527 n. 15 (1963).[1]

Essentially, the Commission's unique petition overlooks the undisputed facts showing the absence of any competitive injury attributable to the respondent's temporary and defensive price reductions during a two-week price war in 1958. Instead the Commission seeks to test the "belief" of the Commission majority (Pet. 13), which the Solicitor General disclaims (Pet. 16),

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[1] Notably, the instant petition also omits the customary imprimatur in antitrust cases of the Antitrust Division of the Department of Justice, which is charged with "seeking review of or defending . . . judgments rendered upon review of Federal Trade Commission orders by courts of appeal." 27 Fed. Reg., p. 12,618 (Dec. 20, 1962).

Actually, the decision below is only one of many recent Court of Appeals' reversals of defective FTC applications of the Robinson-Patman Act, often over dissents by Commissioner Elman. E. g., *Tri-Valley Packing Assn.* v. *FTC*, 1964 CCH Trade Cas., ¶ 71,052 (9th Cir. 1964); *Central Retailer-Owned Grocers, Inc.* v. *FTC*, 319 F. 2d 410 (7th Cir. 1963); *NuArc Co.* v. *FTC*, 316 F. 2d 576 (7th Cir. 1963); *Alhambra Motor Parts* v. *FTC*, 309 F. 2d 213 (9th Cir. 1962); *Thomasville Chair Co.* v. *FTC*, 306 F. 2d 541 (5th Cir. 1962); *Shulton, Inc.* v. *FTC*, 305 F. 2d 36 (7th Cir. 1962); *Exquisite Form Brassiere, Inc.* v. *FTC*, 301 F. 2d 499 (D.C. Cir. 1961), *cert. denied*, 369 U.S. 888 (1962).

When queried as to seeking Supreme Court review of *this* case, FTC Chairman Dixon acknowledged that "it is not unusual, in the past year or two, for us to find ourselves in the p[illegible]n where we disagree with the Solicitor General. Sometimes he has persuaded us to bring the point back in a stronger, factual situation than we have at the moment." Hearings Before Subcommittee No. 4 Select Committee on Small Business, House of Representatives, 88th Cong., 1st Sess., Pursuant to H. Res. 13, p. 1531 (Dec. 9, 1963). Shortly thereafter, he reiterated, with respect to *this* case, that "We would hope that in a stronger set of facts, we will take that type of situation up to the Supreme Court." FTC Dkt. 8537, Tr. of Oral Arg. p. 28 (Feb. 11, 1964).

that this Court's *Morton Salt* opinion provides a verbal formula for disposing of *all* gasoline price war cases.

But, as we shall detail: (1) Since American admittedly did not start the two-week price war in Smyrna and actively sought to confine it, the broader causes or cures of gasoline price wars cannot be adjudged on the narrow facts of this case; (2) the FTC majority's quest for a universal verbal formula to solve the legal problems posed by gasoline price wars has already been rejected by this Court's *Sun Oil* decision, which held that "mechanical word formulas cannot be made to substitute for adequate probative analysis" and "realistic appraisals of relevant competitive facts"; and (3) in any event, the unanimous decision by the Court of Appeals is clearly correct, showing that American's temporary price reductions did not cause the minimal gallonage losses by two or three American dealers during the two-week local price war.

OPINIONS BELOW

The unanimous opinion of the Court of Appeals is reported at 325 F. 2d 101, and reprinted at Pet. App. A., pp. 17-28. The majority opinion of the Commission appears at R. 628-644, and the dissenting opinion of Commissioner Elman appears at R. 644-662. For the convenience of the Court, Commissioner Elman's opinion is reprinted at Resp. App. *infra*, pp. 1a-18a.

QUESTION PRESENTED

The sole question before this Court is whether the unanimous decision by the Court of Appeals correctly concluded, on the facts of *this* record and in light of Commissioner Elman's detailed dissent, that the Com-

mission majority's ruling of "competitive injury" under the Robinson-Patman Act was unsupported by the evidence which showed that American's temporary and defensive price reductions in individual instances to a few dealers around Smyrna, Georgia were not causally responsible for the minor and transient gallonage losses by two or three other American dealers in nearby Marietta during a brief gasoline price war which American did not start.

The Court of Appeals did not reach American's statutory defenses that its price reductions were made in good faith to meet competitors' equally low prices in economic self-defense, and were made "in response to changing conditions affecting the market for" gasoline in Smyrna and vicinity.

STATEMENT

The broad implications recited by the petition cannot expand review beyond the record of this case, which concerns solely the pricing response of American Oil Company during a two-week localized price war which American did not start but made every effort to contain.

Specifically, on about October 10, 1958, a price disturbance broke out near the town of Smyrna, Ga., when a newly opened Phillips-affiliated station just north of the city limits began selling "Paraland" gasoline at 2¢ a gallon below the price then typically charged in that vicinity by major brand stations (R. 24, 259-61, 278). A nearby Shell station matched these lower Paraland prices with a 2¢ reduction, and prices spiraled downward as the Paraland station cut its prices 2¢ more, which in turn was met by the Shell station. The price cuts by these stations were then

met by nearby Sinclair and Gulf stations, and spread rapidly southward into Smyrna itself (R. 260-62).

As the price cutting broadened, American attempted to help its own dealers who complained of cut prices by nearby competitors, by giving temporary price reductions in an amount no greater than competing suppliers had previously given to their own dealers in each instance (CX 362-69, R. 541-48, CX 375-78, R. 554-57). On this basis, American first gave a 3.5¢ per gallon price reduction to its handful of dealers in Smyrna and vicinity (CX 362-63, R. 541-42).[2] After its competitors' price cuts deepened, American followed with additional reductions to its immediately affected Smyrna dealers.

In each instance, prior to reducing its price to any dealer, American verified that he was in fact suffering cut price competition from rival stations nearby, *and* that these had already been receiving price assistance from their suppliers—including Sinclair, Gulf, Shell and Texaco (CX 362-69, 375-78, R. 541-48, 554-57).

Rather than spread the price war beyond Smyrna, American did *not* simultaneously extend the same price reduction to its dealers in Marietta or on U. S. Highway 41 leading north to Chattanooga and south to Atlanta. For most of the two-week period, American's prices to its Smyrna dealers thus averaged about 5¢ per gallon lower than to its Marietta dealers (e.g. CX 378, 380, R. 557, 559). But after cut prices by competing suppliers had carried the price disturbance north into Marietta, American on October 18 and 22 reduced its prices also to its Marietta dealers. In each

[2] Technically, American's reduction took the form of increasing its CPA (competitive price allowance) from .7 to 4.2 cents (CX 160a-b, R. 361-2) and by greater amounts successively.

instance, once again, American's price reductions to its few Marietta dealers were given only in the face of cut price competition by rival stations which had previously received price assistance from their suppliers—including Sinclair, Shell, Standard of Kentucky, Texaco and Gulf (CX 370-72, R. 549-51; CX 379-80, R. 558-59; R. 253-54, 272).

By October 28 the price war ended as suddenly as it began, and prices of all competitors returned to higher levels (CX 383-84, R. 560-61).

During this brief and localized price disturbance, American's Marietta dealers experienced only minor and transitory business inroads. No American dealer in Marietta blamed his temporary gallonage loss on American's price reductions to its Smyrna dealers, as distinct from the general price cutting melee in Smyrna involving American's competitors.[3]

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[3] Only one dealer recipient of American's lower Smyrna price, George Hicks, was ever identified as a possible beneficiary of gallonage lost by any American Marietta dealer (R. 633-35). Actually, Hicks, whose station was near the hub of the original Paraland price cutting fracas, had independently reduced his prices to meet nearby Sinclair, Phillips, and Gulf stations at least four days before he bought at a lower price from American (R. 132-34, 184, CX 329, R. 523; CX 182, R. 393).

As for the "lost business" by the three named Marietta dealers (see Pet. 5), (1) Hitt testified that no American outlet receiving a lower price was located sufficiently close to his station to affect his business "in any way" during the 1958 Smyrna price war (R. 215-16). Moreover, Hitt's business records showed he lost no volume during the price war (CX 398, R. 574-84); (2) Smith's daily records showed that his sales during the price war period were in fact higher than in the weeks before and after (CX 397 A-C, R. 571-73; RX 1A-NN, R. 588-93); and (3) Seagraves, who had just opened up a new station on U.S. 41, felt his business "slacking up each day" after the prices dropped in Smyrna, but his "business went to picking back up", after he, within a few days, also received the lower price (R. 132-34).

But their losses would have been no less if American had failed to assist its Smyrna dealers, since due to the general Smyrna price cutting "the competition would have gotten all of the business" anyway (R. 277). On the other hand, if American had simultaneously extended its temporary price reduction beyond Smyrna north into Marietta or onto Highway 41, inevitably "the price war would have spread to other areas" (R. 274).

Over Commissioner Elman's pointed dissent, the majority Commissioners nevertheless ruled that American's prices created "injury" to competition, wholly irrespective of the competitive conditions and general price cutting in Smyrna which preceded American's own price reductions (R. 634-35).

In Commissioner Elman's view,

> "The much lower prices generally prevailing in Smyrna would have diverted customers from American's Marietta dealers, regardless of the prices which respondent charged its dealers in Smyrna. Any injury to American's Marietta dealers was caused, not by the difference in the prices which American was charging its dealers in these two communities but by the fact that as long as a general price war was going on in Smyrna, and all dealers there were selling gas far below the prices in Marietta, dealers in the latter town—American dealers included—were bound to lose business" (R. 655).

Moreover, "American's price cuts to Smyrna dealers were its competitive response to dynamic market conditions which it did not create and over whose rapid changes it had no control" (R. 656). For, American "did not start the price fracas but found itself caught

helplessly in the middle of all the shooting," and "chose the course of action having the least injurious effect upon competition" (R. 656-57).

Commissioner Elman perceived only these alternatives to the course American had followed: "It could have done nothing," so that its besieged dealers "would have lost all or most of their business to other dealers selling competing brands who had already received price reductions from their suppliers"; or, American could have given its lower price to additional dealers, which "would surely have intensified the price cutting, transforming the brief skirmish into a prolonged, widespread, all-out devastating price war" (R. 657).

In essence, Commissioner Elman believed that "the Commission's approach here again illustrates the danger of dealing with the complexities of a free competitive economy simply by adopting a verbal formula which seems to provide the easiest route to an order to cease and desist . . ." (R. 659).

The Court of Appeals set the Commission majority's ruling aside. Thus, the court concluded that any gallonage losses by American's Marietta dealers were "relatively minor and temporary" and had only "minimal" impact on competition. 325 F. 2d at 105, 106. But since the general Smyrna price cutting drained off the sales of American's Marietta dealers, in any event, there was no "substantial basis upon which to attribute to American's conduct a reasonably probable substantial injury to competition," or to establish a "causal relation between the price discrimination and an actual or reasonably probable injury to competition." *Id.* at 106.

In the court's view, and as recognized by Commissioner Elman (R. 645-51), the generalized doctrine of

the *Morton Salt* case was thus not in point. There, the "inherent capability of lessening competitive ability" stemmed from the operation of a "discriminatory pricing system" which "gave buyers of large quantities a built-in, routine and permanent price advantage over smaller rivals." 325 F. 2d at 106. But such "continuing differentials" in a "discriminatory pricing system" (*ibid.*) had no resemblance to a supplier's temporary and defensive price reductions in a competitive context not of his own making and beyond his control.

Quoting this Court's *Sun Oil* opinion, which had cited the instant Elman dissent (371 U.S. at 527), the court below concluded:

> "In appraising the effects of any price-cut or the corresponding response to it, both the Federal Trade Commission and the courts must make realistic appraisals of relevant competitive facts. Invocation of mechanical word formulas cannot be made to substitute for adequate probative analysis." 325 F. 2d at 106.

ARGUMENT IN OPPOSITION TO CERTIORARI

(1) Since American Admittedly Did Not Start the Two-Week Price War in Smyrna and Actively Sought To Confine It, The Broader Causes or Cures of Gasoline Price Wars Cannot Be Adjudged on the Narrow Facts of This Case

Although *dehors* the record of this case,[4] gasoline price wars doubtless present complex economic prob-

[4] The petition's principal "Reasons for Granting the Writ" (Pet. 7-10) are based not on *this* record, but assert sweeping generalities about "the oil industry," the "major oil companies," and the plight of "thousands of independent retail gasoline dealers," as derived from "various congressional committees and individual members of Congress" who have "urged the Commission" to find cures.

lems. But this Court's *Sun Oil* opinion has already perceived the scarcity of reliable facts and the futility of broad generalizations about price wars as an aid to adjudicating a particular case: The Court recognized that "such price warfare appears to be caused by a number of basic factors," that "it is wholly unclear whether allowance of the price discrimination prolongs or shortens the war's duration", and that "there are logical arguments on both sides of the question and none are wholly persuasive." 371 U.S. 505, 525 (1963).[5]

Above all, the Court acknowledged that "whatever we do here can neither eliminate nor mitigate the major economic forces which are productive of these price wars." *Ibid.*

Nor can the narrow compass of *this* case reveal broader solutions. As Commissioner Elman pointed out, the instant price war "was not planned or the product of a policy of systematic price discriminations," but reflected "immediate competitive responses to individual competitive situations" (R. 656). Moreover, "the Smyrna price war was not respondent's idea or invention, and respondent terminated its price cuts, for competitive reasons, as soon as the actions of its competitors permitted" (*ibid.*). In addition, "American was never the leader. Its price reductions were

[5] FTC Chairman Dixon also acknowledged that "one of the serious problems relative to this industry is the lack of reliable data which will enable one to separate fact from fiction." Hearings Before Subcommittee No. 4, Select Committee on Small Business, House of Representatives, 88th Cong., 1st Sess., Pursuant to H. Res. 13, p. 1551 (Dec. 9, 1963). And see De Chazeau and Kahn, *Integration and Competition in the Petroleum Industry* 477, 483 (1959); Dirlam & Kahn, *Leadership and Conflict in the Pricing of Gasoline*, 61 Yale L.J. 818, 843 (1952).

made only to meet those previously made by its competitors," and "were its competitive response to dynamic market conditions which it did not create and over whose rapid changes it had no control" (R. 652, 656).

Moreover, this case is hardly the vehicle for broad pronouncements on gasoline price wars. For, as Commissioner Elman recognized, any realistic evaluation of gasoline price wars, their cause or cure, could only be based on an inquiry which "has not been made in *this* case," and presents "an unresolved question of fact on which the Commission's opinion casts no light" (R. 650-51).[6]

(2) The FTC Majority's Quest for a Universal Verbal Formula To Solve the Legal Problems Posed by Gasoline Price Wars Has Already Been Rejected by This Court's Sun Oil Decision, Which Held That "Mechanical Word Formulas Cannot Be Made To Substitute for Adequate Probative Analysis" and "Realistic Appraisals of Relevant Competitive Facts"

Whatever "the Commission believes" (Pet. 12, 13, 14) (the Solicitor General disagreeing), no verbal formula based on the *Morton Salt* case, or any other precedent, can provide a panacea for complex economic problems in the competitive marketing of gasoline or any other product. As recognized by this Court long before the *Sun Oil* decision, "industrial activities cannot be confined to trim categories," and antitrust cases "must be read in light of their facts and of a

[6] Four years after the events in issue, and while the instant case was pending before the Court of Appeals, the Commission filed a complaint against Shell which is now pending before the FTC on review of a Hearing Examiner's Initial Decision. Dkt. 8537 (Oct. 1, 1963).

clear recognition of the essential differences in the facts of those cases, and in the facts of any new case to which the rule of earlier decisions is to be applied." *United States* v. *E. I. duPont de Nemours & Co.*, 351 U.S. 377, 395 (1956); *Maple Flooring Assn.* v. *United States*, 268 U.S. 563, 579 (1925). See also *FTC* v. *Sun Oil Co.*, 371 U.S. 505, 527 (1963).

Sixteen years ago this Court's *Morton Salt* decision invalidated, as injurious to competition under the Robinson-Patman Act, a discriminatory quantity discount system which favored large grocery chains over small independent grocers.[7] "Quite obviously," as seen by Commissioner Elman and the court below, "the systematic and continued maintenance of such discriminatory price differentials had the inevitable result of impairing the ability of the disfavored customers to hold an effective competition position vis-a-vis their favored rivals" (R. 646-47; cf. 325 F. 2d at 106). For, "Where, as in *Morton Salt*, a systematic, established, and continuing price discrimination between competing groups of buyers is maintained, the injury to competition is manifest, and no one would seriously suggest in such a case that the Commission must show that the disfavored buyers have been driven to the wall" (R. 648).

On comparable facts, the courts of appeals in the various circuits have consistently upheld findings of competitive injury by reference to this Court's *Morton*

[7] *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948). And see *FTC* v. *Cement Institute*, 333 U.S. 683, 725 (1948) (invalidating "a sales system which consistently results in [the seller's] getting more money for like goods from some customers than he does from others").

Salt decision.[8] Only this month this Court declined to review a unanimous decision, *by the court below* which, on the authority of *Morton Salt*, had sustained the FTC's invalidation of a discriminatory discount system. *Mueller Co.* v. *FTC*, 323 F. 2d 44, 46 (7th Cir. 1963), *cert. denied*, No. 835, O.T. 1963 (May 4, 1964).

But heretofore, the courts of appeals *and* the Federal Trade Commission have perceived that *Morton Salt* contains no talisman to obviate expert evaluation of economic facts in complex pricing cases. Only weeks ago, another unanimous decision by another circuit invalidated an FTC majority ruling, Commissioner Elman dissenting, which discerned competitive "injury" from price bid arrangements for canned groceries without adequate analysis of controlling economic facts. *Tri-Valley Packing Assn.* v. *FTC*, 1964 CCH Trade Cas. ¶71,059 (9th Cir., March 18, 1964). And numerous rulings by the FTC itself have exonerated price differentials among competing customers where, in view of the particular competitive context, there was no resemblance to the discriminatory

[8] E.g., *Standard Motor Products, Inc.* v. *FTC*, 265 F. 2d 674 (2d Cir. 1959), *cert. denied*, 361 U.S. 826 (1959); *P. Sorensen Manufacturing Co.* v. *FTC*, 246 F. 2d 687 (D.C. Cir. 1957); *P. & D. Manufacturing Co.* v. *FTC*, 245 F. 2d 281 (7th Cir. 1957), *cert. denied*, 355 U.S. 884 (1957); *C.E. Nichoff & Co.* v. *FTC*, 241 F. 2d 37 (7th Cir. 1957), *modified on other grounds*, 355 U.S. 411 (1958); *Whitaker Cable Corp.* v. *FTC*, 239 F. 2d 253 (7th Cir. 1956), *cert. denied*, 353 U.S. 938 (1957); *E. Edelmann & Co.* v. *FTC*, 239 F. 2d 152 (7th Cir. 1956), *cert. denied*, 355 U.S. 941 (1958); *Moog Industries, Inc.* v. *FTC*, 238 F. 2d 43 (8th Cir. 1956), *aff'd on other grounds*, 355 U.S. 411 (1958).

favoritism for large buyers reprehended by the Robinson-Patman Act and invalidated by *Morton Salt*.[9]

Indeed, any "automatic verbal-formula approach in determining probable injury to competition" (R. 649) would mock the Commission's intended role as "a body of experts" to sift the competitively beneficial from the competitively inimical forms of price variation. Cf. *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 54 (1948); *FTC* v. *R. F. Keppel & Bro., Inc.*, 291 U.S. 304, 314 (1934).

The instant decision by the Court of Appeals, in sum, reflects no novel departure from *Morton Salt*. Rather, the Court of Appeals' decision responds precisely to this Court's *Sun Oil* directive that "in appraising the effects of any price cut or the correspond-

[9] E.g., *Purex Corp.*, 51 F.T.C. 100, 113-114, 176-177 (1954) (recognition that *Morton Salt* "should not be applied automatically" and that competitive injury does not necessarily flow from isolated loss of sales); *Fred Brunner Corp.*, 57 F.T.C. 771, 782 (1960) (no competitive "injury" from discriminations "viewed in the light of the actual competitive situation"); *Foremost Dairies, Inc.*, Dkt. 7475, pp. 2-4 (May 23, 1963) (partial dismissal concerning some discounts where record reflected "neither their magnitude nor their duration"); Initial Decision, *Forster Mfg. Co.*, Dkt. 7207, pp. 27-28 (Feb. 2, 1962), adopted by FTC Opinion, pp. 4, 25 (Jan. 3, 1963) (partial dismissal where one price differential of inconsequential impact on customer competition); *Frank G. Shattuck Co.*, Dkt. 7743, pp. 6-8 (Apr. 22, 1964) (dismissal where "no proof of actual competitive injury" or "probable impact on average net profits"); cf. Initial Decisions, *Pacific Molasses Co.*, Dkt. 7462, pp. 33-34 (Dec. 17, 1962), (no "significant" injury where price protection granted "only sporadically"); *American Metal Products Co.*, Dkt. 7365, p. 13 (Jan. 15, 1962), vacated as moot (June 8, 1962) (price differential to particular buyer gave it no competitive "advantage"). See also Edwards, *The Price Discrimination Law* 629 (1959); Dirlam & Kahn, *Fair Competition: The Law and Economics of Antitrust Policy* 258 (1954).

ing response to it, both the Federal Trade Commission and the courts must make realistic appraisals of relevant competitive facts."[10]

No basis exists, moreover, for any speculation that review of *this* case can somehow predetermine other FTC proceedings, whether pending or not yet brought, which are ostensibly "based on the same theory of injury to competition that is involved in the present case" (Pet. 10). In the first place, no "theory" is discernible from the FTC majority's position other than the assumption that all substantial price differentials among competing customers are automatically injurious to competition, regardless of competitive circumstances. Such a lethal "theory" would outlaw not only all price differentials during gasoline price wars but in every other marketing context, and thereby "raise the specter of a flat prohibition of price differentials" which this Court has disclaimed. *FTC* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 553 (1960).

Moreover, the three cases cited by the Commission (Pet. 10) may face dismissal on the basis of the various statutory defenses for the challenged pricing, apart from any issue as to competitive injury.[11] In

[10] 371 U.S. at 527.

[11] For example, in *Texaco, Inc.*, Dkt. 6898, the Initial Decision sustained a meeting competition defense as to some of the challenged prices, which were alternatively exonerated in view of the geographic distances separating the affected dealers. Dkt. 6898, p. 31 (Dec. 3, 1962). In the *Shell* case, some charges were dismissed by the Initial Decision for inadequate proof of interstate commerce, and other charges are subject to statutory cost justification and meeting competition defenses. Dkt. 8537, pp. 10-11, 20, 24-28 (Oct. 1, 1963). The *Humble* case also involves a cost justification defense, which was never an issue in *this* case. Opinion Accompanying Ruling on Certified Question, Dkt. 8543, p. 4 (Dec. 5, 1963).

any event, each reflects a distinct and disparate evidentiary record which hardly permits prognostication as to ultimate disposition by the Commission, let alone before a reviewing court. Even more conjectural are the unidentified "eight investigations" (Pet. 10), and *their* upshot *if* a formal complaint is filed by the Commission, *if* a hearing examiner finds the unrevealed charges proven and rejects all potential defenses, *and if* a majority of the Commission adjudges a statutory violation on the basis of the evidence of record and disapproves all possible statutory defenses in the particular case.

Still more fanciful is the prophesy that the Seventh Circuit "would undoubtedly set aside any orders" issued by the FTC "on the same theory of injury to competition that is involved in the present case" (Pet. 10). Aside from this questionable prejudgment as to the Commission's and the court's impartial decision in cases which have not even been filed, let alone proven, the Court of Appeals decided this case not on a "theory" but on the Commission's failure of proof, as highlighted by Commissioner Elman's dissenting opinion. Where the Commission's charges are factually supported, the court below has sustained Commission findings of injury to competition. E.g., *Mueller Co.* v. *FTC*, 323 F. 2d 44 (7th Cir. 1963), *cert. denied*, No. 835, O.T. 1963 (May 4, 1964); *E. Edelmann & Co.* v. *FTC*, 239 F. 2d 152 (7th Cir. 1956), *cert. denied*, 355 U.S. 941 (1958); *C. E. Nichoff & Co.* v. *FTC*, 241 F. 2d 37 (7th Cir. 1957), *modified on other grounds*, 355 U.S. 411 (1958); *Whitaker Cable Corp.* v. *FTC*, 239 F. 2d 253 (7th Cir. 1956), *cert. denied*, 353 U.S. 938 (1957); cf. *Goodyear Tire & Rubber Co.* v. *FTC*, 1964 CCH Trade Cas. ¶71,093 (7th Cir., April 24, 1964).

And in the absence of adequate proof of the requisite competitive injury, *no* court of appeals should be expected to ratify unsupportable FTC majority rulings.

(3) In Any Event, the Unanimous Decision by the Court of Appeals Is Clearly Correct, Showing That American's Temporary Price Reductions Did Not Cause the Minimal Gallonage Losses by Two or Three American Dealers During the Two-Week Local Price War

Particularly in light of this Court's admonitions in the *Sun Oil* case, the decision below is clearly correct on the basis of *the evidence in this record*.

As summarized in the Statement, *supra* pp. 4-9, whatever transitory losses beset American's Marietta dealers are traceable to the overall Smyrna price cutting initiated by American's competitors, *not* to American's belated and defensive price assistance which only met the pre-existing abnormal price condition.

By contrast, American's alternatives under the FTC majority's legal theory are competitive chaos and devastation. On the one hand, American could have done nothing, closed its eyes to the Smyrna price outbreak, and abandoned its dealers there to certain liquidation at the hands of nearby competitors aided by lower prices of their suppliers. "Competitively," as Commissioner Elman noted, "the injury to [American's] dealers would have been far more drastic" (R 657). Conversely, American could have simultaneously extended its lower prices to all American dealers in Marietta and on U.S. 41, prior to such action by competitors. Inevitably, such a blanket price cut would have spread the local Smyrna price war to other regions, and spilled the price cutting onto the super-

highway south to Atlanta and Florida and north to Chattanooga and beyond—exploding "a local brush fire into a nuclear price war" (R. 658).

Beyond the competitive havoc threatened by the FTC majority's alternatives, the FTC's position would trap any supplier in a hopeless legal dilemma. To Commissioner Elman's pointed inquiry as to where American's price reductions *could* safely stop, FTC counsel baldly retorted: "I don't think I am capable of answering that, and I don't think you are, and I don't think anybody is capable of answering that question" (R. 625).

The Court of Appeals inevitably recognized that the FTC majority had shunned the essential "realistic appraisals" prescribed by this Court's *Sun Oil* opinion, instead "adopting a verbal formula which seems to provide the easiest route to an order to cease and desist" (R. 659; cf. 325 F. 2d at 106).

CONCLUSION

The decision of the court below is clearly correct, and nowhere does the Solicitor General's position maintain the contrary. The overall problem of gasoline price wars, as recognized by this Court's *Sun Oil* opinion, is incapable of solution on this narrow factual record. To be sure, "the Commission believes," although the Solicitor General "does not agree," that the *Morton Salt* decision provides a verbal formula for the resolution of all future controversies relating to gasoline pricing. But the decision below is based on the facts of *this* case and not on any formula, and this Court's *Sun Oil* opinion has already repudiated "mechanical word formulas" as a "substitute for ade-

quate probative analysis"; and "realistic appraisals of relevant competitive facts." 371 U.S. at 527.

For the foregoing reasons, the petition for certiorari should be denied.

On the other hand, if a dispositive ruling by this Court appears appropriate, the Court may well enter a summary affirmance of the decision below, in the absence of any substantial legal or factual issue presented for review, and on the basis of the representations of the Solicitor General and the opinion of Commissioner Elman. Cf. *United Shoe Machinery Corp. v. United States*, 347 U.S. 521 (1954).

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